

CHAPTER NO. 345

SENATE BILL NO. 899

By Rochelle

Substituted for: House Bill No. 740

By Kisber

AN ACT To amend Tennessee Code Annotated, Title 7, Chapter 39 and Section 7-51-910, relative to Energy Acquisition Corporations, and the purchase of energy by local governments, utility districts and gas authorities.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. The Tennessee Code Commission is directed to change the title of Title 7, Chapter 39 from "Municipal Gas Companies" to "Energy Acquisition Corporations".

SECTION 2. Tennessee Code Annotated, Section 7-39-101, is hereby amended by inserting the following language as subsection (a) and redesignating subsequent subsections accordingly:

(a) This chapter shall be known and may be cited as the "Energy Acquisition Corporations Act".

SECTION 3. Tennessee Code Annotated, Section 7-39-102(5), is hereby deleted in its entirety and substituted in place thereof shall be the following:

"Governing Body" means, with respect to a municipality which is an associated municipality of, or purchaser of gas from, an acquisition corporation established to exercise the powers herein described with respect to natural gas and natural gas substitutes, any board, commission or other instrumentality of such municipality having jurisdiction, control and management of the gas distribution system of that municipality, and, with respect to a municipality which is an associated municipality of, or purchaser of electrical power from, an acquisition corporation established to exercise the powers herein described with respect to electrical power, any board, commission or other instrumentality of such municipality having jurisdiction, control and management of the electrical power distribution system of that municipality. With respect to any action permitted or required to be taken under this chapter by any such board, commission or instrumentality of a county or incorporated city, town or metropolitan government, if such board, commission or instrumentality by resolution waives its right to take such action or if no such board, commission or instrumentality exists, the power to take such action shall be vested in the body in which the general legislative powers of the county or incorporated city, town or metropolitan government are vested. The governing body of a utility district or gas authority shall be the board of commissioners of the utility district or gas authority or such other board or body as shall be vested by statute or private act with jurisdiction, control and management of the energy distribution system of the district or authority; and

SECTION 4. Tennessee Code Annotated, Section 7-39-102(6), is hereby deleted in its entirety and substituted in place thereof shall be the following:

(6) "Municipality" means any county, incorporated city, town or metropolitan government, utility district, or gas authority in this state. The term "municipally owned" means owned by a municipality as defined in this chapter.

SECTION 5. Tennessee Code Annotated, Section 7-39-102, is hereby amended to designate the existing section as subsection (a) and add at the end thereof a new subsection (b) as follows:

(b) An incorporator or a director of an energy acquisition corporation must be a natural person who meets any of the following qualifications:

(1) With respect to a natural person seeking to act as an incorporator or director of an energy acquisition corporation organized or proposed to be organized with respect to and for the benefit of a county or incorporated city, town or metropolitan government, a duly qualified elector of and taxpayer in said county or incorporated city, town or metropolitan government; or

(2) With respect to a natural person seeking to act as an incorporator or director of an energy acquisition corporation organized or proposed to be organized with respect to and for the benefit of a utility district or gas authority, a resident and landowner within the boundaries of said utility district or gas authority; or

(3) A member of the governing body of the municipality with respect to and for the benefit of which the energy acquisition corporation is organized or proposed to be organized; or

(4) An employee of the energy distribution system of the municipality with respect to which and for the benefit which the energy acquisition corporation is organized or proposed to be organized.

SECTION 6. Tennessee Code Annotated, Section 7-39-201(a), is hereby deleted in its entirety and substituted in place thereof shall be the following:

(a) Whenever any number of natural persons, not less than three (3), each of whom shall meet any one of the qualifications for an incorporator as set forth in § 7-39-102(b), files with the governing body of the municipality with respect to which the corporation is proposed to be organized and for the benefit of which such corporation will function an application in writing seeking permission to apply for the incorporation of an energy acquisition corporation of such municipality, the governing body shall proceed to consider such application.

SECTION 7. Tennessee Code Annotated, Section 7-39-202(a)(1) and (2), are hereby deleted in their entirety and substituted in place thereof shall be the following:

(1) The names and residences of the applicants, together with a recital that each of them meets the qualifications for an incorporator as set forth in § 7-39-102(b);

(2) The name of the corporation;

SECTION 8. Tennessee Code Annotated, Section 7-39-301(a), is hereby amended by deleting the words "all of whom shall be duly qualified electors of and taxpayers in the municipality" and substituting the phrase "each of whom shall meet the qualifications for a director as set forth in § 7-39-102(b)".

SECTION 9. Tennessee Code Annotated, Section 7-39-302(a), is hereby amended by deleting existing subdivision (7), substituting the following new subdivisions, and redesignating subsequent subdivisions accordingly:

(7) Enter into any contract or arrangement with any gas producer, pipeline company or other seller of natural gas or natural gas substitutes, whether within or outside the State of Tennessee, providing for the acquisition of natural gas and natural gas substitutes containing such terms, covenants, representations, warranties and provisions and being for such period or duration as shall be determined by the board of directors of the corporation. In connection with any contract to acquire natural gas or natural gas substitutes, the corporation may enter into commodity price exchange or swap agreements, agreements establishing price floors or ceilings, or both, or other price hedging contracts with any person or entity under such terms and conditions as the board of directors of the corporation may determine, including, without limitation, provisions permitting the corporation to indemnify or otherwise pay any person or entity for any loss of benefits under such agreement upon early termination thereof or default thereunder. When entering into any such contract or arrangement or any such swap, exchange or hedging agreement evidencing a transaction bearing a reasonable relationship to this state and also to another state or nation, the corporation may agree in the written contract or agreement that the rights and remedies of the parties thereto shall be governed by the laws of this state or the laws of such other state or nation; provided, however, jurisdiction over any corporation against which an action on such a contract or agreement is brought shall lie solely in a court located in Tennessee which would otherwise have jurisdiction of action brought in contract against such corporation.

(8) Acquire electrical power by any contract or arrangement from the Tennessee Valley Authority or any similar governmental agency or any other person or entity whether within or outside the State of Tennessee, and acquire any kind of interest, alone or with others, in any electrical power production or transmission facilities, including all substations and other facilities necessary therefor or related thereto, whether inside or outside the State of Tennessee, and enter into any contract or arrangement in connection therewith. Any such contracts authorized herein shall contain such terms, covenants, representations, warranties and provisions and be for such period or duration as shall be determined by the board of directors of the corporation. In connection with any contract to acquire electrical power, the corporation may enter into commodity price exchange or swap agreements, agreements establishing price floors or ceilings, or both, or other price hedging contracts with any person or entity under such terms and conditions as the board of directors of the corporation may determine, including, without limitation, provisions permitting the corporation to indemnify or otherwise pay any person or entity for any loss of benefits under such agreement upon early termination thereof or default thereunder. When entering into any such contract or arrangement or any such swap, exchange or hedging agreement evidencing a transaction bearing a reasonable relationship to this state and also to another state or nation, the corporation may agree in the written contract or agreement that the rights and remedies of the parties thereto shall be governed by the laws of this state or the laws of such other state or nation; provided, however, jurisdiction over any corporation against which an action on such a contract or agreement is brought shall lie solely in a court located in Tennessee which would otherwise have jurisdiction of action brought in contract against such corporation.

(9) Sell, exchange or interchange natural gas or natural gas substitutes and to provide by sale or otherwise, an adequate, dependable and economical gas supply to the corporation's associated municipalities; the state and its departments, agencies, instrumentalities and political subdivisions; gas utility systems either privately or publicly owned; the United States government; other energy acquisition corporations established pursuant to this chapter or under the laws of another jurisdiction; and private persons and entities, whether any of such consumers are inside or outside this state; to establish prices to be paid for such gas or gas substitutes and pricing structures with respect thereto, including provision for price rebates, discounts, and dividends; and in connection with any such sales, exchanges or interchanges, to act as agent for such consumers, to secure gas contracts and arrangements with other entities or persons, to make contracts for the sale, exchange, interchange, pooling, transmission, distribution, or storage of gas and fuel of any kind for any such purposes, inside or outside this state, and to transmit gas both for itself and on behalf of others;

(10) Sell, exchange or interchange electrical power and to provide by sale or otherwise, an adequate, dependable and economical electrical power supply to the corporation's associated municipalities; the state and its departments, agencies, instrumentalities and political subdivisions; electrical power utility systems either privately or publicly owned; the United States government; other energy acquisition corporations established pursuant to this chapter or under the laws of another jurisdiction; and private persons and entities, whether any of such consumers are inside or outside this state; to establish prices to be paid for such electrical power and pricing structures with respect thereto, including provision for rebates, discounts, and dividends; and in connection with any such sales, exchanges or interchanges, to act as agent for such consumers, to secure electrical power contracts and arrangements with other entities or persons, to make contracts for the sale, exchange, interchange, pooling, transmission, and distribution of electrical power for any such purposes, inside or outside this state, and to transmit electrical power both for itself and on behalf of others;

(11) Conduct its meetings by telephonic, electronic or other means of communication, in accordance with the requirements of § 8-44-108 as if the corporation were an agency of state government;

(12) Provide to an associated municipality, any entity purchasing gas or electrical energy from the corporation, or any other energy acquisition corporation, transportation and storage capacity, and management services associated therewith, energy supply development and management, technical, financial, informational, promotional and educational services related to the provision of gas and electrical energy;

SECTION 10. Tennessee Code Annotated, Section 7-39-302(b), is hereby deleted in its entirety.

SECTION 11. Tennessee Code Annotated, Section 7-39-304(a), is hereby amended to delete the words "with the approval of the governing body" in the first sentence thereof and to substitute in place thereof the phrase "by resolution of the governing body".

SECTION 12. Tennessee Code Annotated, Section 7-39-304(a), is hereby amended to delete subdivisions (2), (3) and (4) thereof (exclusive of the paragraph following subdivision (4)) and to substitute in place thereof the following:

(2) Guarantee or assume the payment of the principal of and interest on any bonds or notes issued by such corporation or the payment or performance of any obligations of the corporation incurred in connection with the purchase of gas or electrical power by the corporation;

(3) Pledge the revenues of its energy distribution system to secure the payment of the principal of and interest on any bonds or notes of the corporation or to secure its guaranty of such bonds or notes;

(4) Pledge the revenues of its energy distribution system to secure the payment of obligations incurred in connection with the purchase of gas or electrical power, as appropriate, by the corporation or to secure its guaranty of any such obligations.

SECTION 13. Tennessee Code Annotated, Section 7-39-304, is hereby amended to designate the unnumbered paragraph following subdivision (a)(4) as subdivision (b)(1) and to add two new paragraphs immediately following said subdivision (b)(1) designated as subdivisions (b)(2) and (b)(3) as follows and to redesignate the current subdivision (b) as new subdivision (c):

Any pledge of, or lien on, revenues of the energy distribution system to secure the payment of any bonds, notes or obligations of such corporation pursuant to the provisions of this chapter shall be valid and binding from the time the pledge or lien is created or granted and shall inure to the benefit of the holder or holders of such bonds or notes or the obligee under any such obligation until the payment or satisfaction in full thereof. The priority of any pledge or lien with respect to competing pledges or liens shall be determined by the date such pledge or lien is created or granted. Neither the resolution, the indenture, nor any other instrument granting, creating or giving notice of the pledge or lien need be filed or recorded to preserve or protect the validity or priority of such pledge or lien.

Any pledge or lien created or granted pursuant to the terms hereof shall not be subject to the mortgage tax imposed by § 67-4-409(b) and any other tax which is imposed upon the privilege of recording any instrument giving notice of the creation of a lien, security interest or pledge, and such exemption shall apply to any transaction to which the municipality is a party pursuant to this chapter, whether as the secured party or the debtor.

SECTION 14. Tennessee Code Annotated, Section 7-39-304, is hereby amended to add a new subsection (c), as follows:

(c) An associated municipality shall not have the power to assume or guarantee bonds, notes or other obligations of a corporation in such a way as to pledge the full faith and credit and taxing power of the associated municipality to the payment thereof.

SECTION 15. Tennessee Code Annotated, Section 7-39-305(a), is hereby amended to add two new sentences at the end thereof as follows:

Any bonds of a corporation may be issued bearing a fixed interest rate or a rate which varies from time to time or a rate which is established from time to time during the term thereof and may be issued granting to the owners thereof put rights and such other rights as the board of directors of the corporation shall determine. In connection with the issuance of its bonds, a corporation is authorized to enter into such additional agreements as shall be necessary to

facilitate the issuance and sale of the bonds or establishment of the interest rate or rates, including agreements providing for liquidity and credit enhancement, and reimbursement agreements relating thereto.

SECTION 16. Tennessee Code Annotated, Section 7-39-305, is hereby amended to add the following new subsections:

(f) With respect to all or any portion of any issue of bonds issued or anticipated to be issued hereunder, at any time during the term of the bonds, and upon receipt of a report of the Comptroller of this state or his designee finding that the contracts and agreements authorized herein are in compliance with the guidelines, rules or regulations as set forth below, a corporation by resolution may authorize and enter into interest rate swap or exchange agreements, agreements establishing interest rate floors or ceilings, or both, and other interest rate hedging agreements under such terms and conditions as the board of directors of the corporation may determine, including, without limitation, provisions permitting the corporation to pay to or receive from any person or entity any loss of benefits under such agreement upon early termination thereof or default under such agreement.

(g) The governing body of a corporation may enter into an agreement to sell its bonds under this part providing for delivery of its bonds on a date greater than ninety (90) days and not greater than five (5) years (or such greater period of time if approved by the Comptroller or his designee) from the date of execution of such agreement only upon receipt of a report of the Comptroller of the state or his designee finding that such an agreement or contract of a corporation to sell its bonds as authorized in this subsection is in compliance with the guidelines, rules or regulations adopted or promulgated by the State Funding Board in accordance with the provisions below. Agreements to sell bonds for delivery ninety (90) days or less from the date of execution of the agreement to sell the bonds do not require a report of the Comptroller of the state or his designee.

(h) Prior to the adoption or promulgation by the State Funding Board of guidelines, rules or regulations with respect to the contracts and agreements authorized in subsections (f) and (g), a corporation may enter into such contracts or agreements to the extent otherwise authorized in this chapter or in any other law notwithstanding the provisions of subsections (f) and (g) hereof. Nothing in the provisions of this section is intended to alter any existing authority in this chapter or in any other law otherwise providing authority for a corporation to enter into the contracts or agreements described in subsections (f) and (g) heretofore entered into prior to the adoption or promulgation by the State Funding Board of guidelines, rules or regulations.

(i) The State Funding Board shall establish guidelines, rules or regulations with respect to the agreements and contracts authorized in subsections (f) and (g), which may include, but shall not be limited to, the following: (1) the conditions under which such agreements or contracts can be entered into; (2) the methods by which such contracts are to be solicited and procured; (3) the form and content such contracts shall take; (4) the aspects of risk exposure associated with such contracts; (5) the standards and procedures for counterparty selection, including rating criteria; (6) the procurement of credit enhancement, liquidity facilities, or the setting aside of reserves in connection with such contracts or agreements; (7) the methods of securing the financial interest in such contracts; (8) the methods to be used to reflect such contracts in the corporation's financial statements; (9) financial monitoring and periodic assessment of such contracts by the corporation; (10) the application and source

of non-periodic payments; and (11) educational requirements for officials of any corporation responsible for approving any such contract or agreement. Prior to the adoption by the board of directors of the corporation of a resolution authorizing such contract or agreement, a request shall be submitted to the Comptroller of the Treasury or his designee for a report finding that such contract or agreement is in compliance with the guidelines, rules or regulations of the State Funding Board. Within fifteen (15) days of receipt of the request, the Comptroller or his designee shall determine whether the contract or agreement substantially complies with the guidelines, rules or regulations and shall report thereon to the corporation. If the report of the Comptroller or his designee finds that the contract or agreement complies with the guidelines, rules or regulations of the State Funding Board or the Comptroller shall fail to report within said fifteen (15) day period, then the corporation may take such action with respect to the proposed contract or agreement as it deems advisable in accordance with the provisions of this section and the guidelines, rules or regulations of the State Funding Board. If the report of the Comptroller or his designee finds that such contract or agreement is not in compliance with the guidelines, rules or regulations, then the corporation is not authorized to enter into such contract or agreement. The guidelines, rules or regulations shall provide for a process for the appeal of a determination of noncompliance.

SECTION 17. Tennessee Code Annotated, Section 7-39-305, is hereby amended to add a new subsection (g), as follows:

(g) Neither an associated municipality nor any municipality, acquisition corporation or other entity purchasing natural gas or electrical power from the corporation shall in any event be liable for the payment of the principal of or interest on any bonds, notes or other obligations of the corporation, or for the performance of any pledge, mortgage, obligation or agreement of any kind whatsoever which may be undertaken by the corporation and none of the bonds, notes or other obligations of the corporation nor any of its agreements or obligations shall be construed to constitute an indebtedness of any associated municipality, acquisition corporation or other entity purchasing natural gas or electrical power from the acquisition corporation, within the meaning of any constitutional or statutory provision whatsoever, except to the extent the associated municipality, acquisition corporation, or other entity shall have guaranteed or assumed the payment of any bonds, notes or other obligations of such corporation or pledged its revenues to the payment of any bonds, notes or obligations of the corporation pursuant to the terms of § 7-39-304 or of any other provision of applicable law.

SECTION 18. Tennessee Code Annotated, Section 7-39-307, is hereby amended to add at the end of the second sentence thereof following the words "state of Tennessee", the following:

including the mortgage tax imposed by § 67-4-409(b) and any other tax which is imposed upon the privilege of recording any instrument giving notice of the creation of a lien, security interest or pledge, and such exemption shall apply to any transaction to which the corporation is a party whether as the secured party or the debtor

SECTION 19. Tennessee Code Annotated, Section 7-39-309, is hereby amended to add a new subsection (c) as follows:

(c) Any pledge of, or lien on, revenues and receipts of the corporation to secure the payment of any bonds, notes or obligations of the corporation issued

pursuant to the provisions of this chapter shall be valid and binding from the time the pledge or lien is created or granted and shall inure to the benefit of the holder or holders of such bonds or notes or the obligee under any such obligation until the payment or satisfaction in full thereof. The priority of any pledge or lien with respect to competing pledges or liens shall be determined by the date such pledge or lien is created or granted. Neither the resolution, the indenture, nor any other instrument granting, creating or giving notice of the pledge or lien need be filed or recorded to preserve or protect the validity or priority of such pledge or lien.

SECTION 20. Tennessee Code Annotated, Section 7-39-312(2)(A), is hereby deleted in its entirety and substituted in place thereof shall be the following:

(A) The persons filing the application for incorporation under § 7-39-201 must include at least one (1) applicant who meets the qualifications of an incorporator as set forth in § 7-39-102(b) from each municipality, and such application must be approved by the governing body of each municipality;

SECTION 21. Tennessee Code Annotated, Section 7-39-312(2)(C), is hereby deleted in its entirety and substituted in place thereof shall be the following:

(C) The board of directors may, but shall not be required to, include a member who meets the qualifications of a director as set forth in § 7-39-102(b) for each associated municipality; provided that each board member shall meet the qualifications of a director as set forth in § 7-39-102(b) in one (1) or more of such municipalities; and members of the board may be nominated and elected, and may be removed for cause, in any manner provided in the certificate of incorporation or bylaws of the corporation or by resolution of the board of directors of the corporation;

SECTION 22. Tennessee Code Annotated, Section 7-39-312(3), is hereby deleted in its entirety and the succeeding subdivision shall be renumbered accordingly.

SECTION 23. Tennessee Code Annotated, Section 7-39-312(4), [(to be renumbered as 7-39-312(3))] is hereby deleted in its entirety and substituted in place thereof shall be the following:

An energy acquisition corporation may be joined by any one (1) or more municipalities, each of which shall be deemed to be an "associated municipality" for purposes of this chapter, and all provisions of this chapter shall, as nearly as may be practicable, be made applicable to such corporation and each such associated municipality, subject to the requirements of subdivision (2) and subject to the following:

(A) Each municipality seeking to become an "associated municipality" of such corporation must make application in writing to the board of directors of such corporation to become an "associated municipality", following approval of such application by resolution of the governing body of such municipality; and

(B) The board of directors of such corporation must approve the application of such municipality to become an "associated municipality" of such corporation.

SECTION 24. Tennessee Code Annotated, Title 7, Chapter 39, Part 3, is hereby amended by deleting Section 7-39-313, inserting the following new sections and renumbering the succeeding sections accordingly:

7-39-313. (a) All funds of a corporation shall be deposited in accordance with the provisions of Title 9, Chapter 4, Parts 1, 4 and 5; provided, that any bank, savings and loan institution or savings bank located outside the State of Tennessee which is under the supervision of the United States Comptroller of the Currency or the office of Thrift Supervision, may act as a depository, trustee, registration agent or paying agent in connection with any bonds or notes issued by a corporation, notwithstanding the provisions of Title 9, Chapter 4, Parts 1, 4 and 5.

(b) Funds of a corporation are authorized to be invested in the following:

(1) Direct obligations of the United States government or any of its agencies;

(2) Obligations guaranteed as to principal and interest by the United States government or any of its agencies;

(3) Certificates of deposit and other evidences of deposit at state and federally chartered banks, savings and loan institutions or savings banks deposited and collateralized as described in subsection (a) hereof;

(4) Repurchase agreements entered into with the United States or its agencies or with any bank, broker-dealer or other such entity so long as the obligation of the obligated party is secured by a perfected pledge of full faith and credit obligations of the United States or its agencies;

(5) Guaranteed investment contracts or similar agreements providing for a specified rate of return over a specified time period with entities rated in one of the two (2) highest rating categories of a nationally recognized rating agency;

(6) The local government investment pool created by Title 9, Chapter 4, Part 7;

(7) Direct general obligations of a state of the United States, or a political subdivision or instrumentality thereof, having general taxing powers and rated in either of the two highest rating categories by a nationally recognized rating agency of such obligations;

(8) Obligations of any state of the United States or a political subdivision or instrumentality thereof, secured solely by revenues received by or on behalf of the state or political subdivision or instrumentality thereof irrevocably pledged to the payment of the principal of and interest on such obligations, rated in the two highest rating categories by a nationally recognized rating agency of such obligations.

7-39-314. Any corporation formed pursuant to this chapter shall be audited in the manner provided in Title 6, Chapter 56.

7-39-315. The board of directors of a corporation formed pursuant to this chapter shall be considered a governing body for purposes of Title 8, Chapter 44.

7-39-316. Any municipality has the power, together with all powers incidental thereto or necessary for the performance thereof, exercisable alone or jointly with any other public agency, acting by resolution of its governing body, to purchase, by contract or other agreement, natural gas or electrical power, or both, from an energy acquisition corporation. Any municipality has the power to enter into any contract or arrangement with a corporation for the acquisition of natural gas or natural gas substitutes or electrical power, containing such terms, covenants, representations, warranties and provisions and for such period or duration as the governing body of the municipality shall determine, including contracts containing the agreement of the municipality to take or pay for any gas, gas substitutes or electrical power provided by the corporation to the municipality.

7-39-317. Notwithstanding any law to the contrary, a corporation may enter into any contract authorized by this chapter without complying with competitive bidding requirements.

SECTION 25. Tennessee Code Annotated, Section 7-51-910, is amended by deleting from the catchline and the body thereof the words "natural gas or propane gas" and by inserting in their place the language "natural gas, propane gas or electric power".

SECTION 26. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 27. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: May 26, 1999


JOHN S. WILDER
SPEAKER OF THE SENATE


JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 14th day of June 1999


DON SUNDQUIST, GOVERNOR